

Opinion No. 61-98

October 4, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Mr. W. S. Eoff, Director, Liquefied Petroleum Gas Commission, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. If a main office, having paid a full license fee of \$ 240.00 for a full operation, installs a branch storage tank or tanks and works that area out of this additional plant, may this Commission declare such location a branch and require an additional license, even though the branch is operated under the same name as the main office and no records are kept at the branch location?
2. If a liquefied petroleum gas company has paid the full license fee of \$ 240.00 for a main location, should it be permitted to station trucks and employees in surrounding towns for the purpose of servicing the area with liquefied petroleum gas without the payment of additional license fees?
3. If an out-of-state operator has paid the \$ 240.00 license fee, should he be permitted to base a truck and an employee in several New Mexico towns for the purpose of servicing the area with liquefied petroleum gas without the payment of an additional license fee for each location?

CONCLUSIONS

1. Yes.
2. No.
3. No.

OPINION

ANALYSIS

After examining Sections 65-7-5 and 65-7-8, N.M.S.A., 1953 Comp., we have answered your questions in combination narrative form.

Section 65-7-5, supra, provides that

"No person, firm or corporation shall engage in this state in the manufacturing, assembling, repairing, selling or installing of containers or appliances, to be used with liquefied petroleum gases as a fuel, nor shall such person, firm or corporation engage in the manufacture, sale, transportation, dispensing or storage of liquefied petroleum gases within this state, except where stored by the ultimate consumer for consumption only, **without having first obtained from the commission a license so to do for each main or branch office or business operated within the state * * ***" (Emphasis added)

Under Section 65-7-8, supra, ten different types of licenses are provided for depending upon the particular facets of the industry in which the applicant is engaged, and "a separate license must be secured for each of the activities or operations." The total fees to be charged any one licensee for a combination of activities is \$ 240.00. However, this section also requires payment of "**license fees for each place of business**".

These provisions read together display a legislative intent to charge separate license fees for each place of business in the State, whether called main office, branch office, or other place of business. Likewise, the \$ 240.00 maximum applies only to the combination of licenses issued for one place of business. Each other place of business must also secure and pay the prescribed license fees up to a maximum of \$ 240.00. And this is true even though the branch office or other place of business uses the same name and is owned by the same firm or person. In legal effect they are different licensees.

In applying these provisions, the Liquefied Petroleum Gas Commission will have to determine in each instance whether the firm has a branch office or other place of business. Thus, the actual method of operation will be controlling in each case. Subterfuges cannot be employed by those persons engaged in this business to defeat the intention of the Liquefied Petroleum Gas Act.

The courts have laid down various guidelines for agencies to follow in making a determination as to "place of business" and "branch office". In the case of **Ft. Smith Lumber Co. v. Shackelford**, 115 Ark. 272, 171 S.W. 99, the court concluded that these two terms are not synonymous and that it is entirely possible to have a place of business even though it does not meet the requirements for a main or branch office.

"Place of business" being the broader term, in most instances the Commission will have to determine whether an operator has a place or places of business in addition to his main office. In the case of **McCall v. State ex rel. Daniels**, 156 Fla. 437, 23 So. 2d 492, the court simply said a place of business is a location where business is transacted. And in **Goldstein v. State Revenue Commission**, 50 Ga. App. 317, 178 S.E. 164, the court held that each place maintained by a dry cleaner for receipt and delivery of customers' clothes was subject to the occupation tax upon "place of business of person engaged in dry cleaning" even though the actual cleaning was done elsewhere. **Barker v. Inhabitants of Watertown**, 137 Mass. 227; **Arkansas Power & Light Co. v. Hoover**, 182 Ark. 1065, 34 S.W. 2d 464.

Among the important factual elements to be considered are the following: presence or absence of a building or employee's home as an office; the presence of a telephone in the company's name; whether the company has a regular employee and truck in the town; whether the company has a sign and whether it advertises its services and goods. If all the company has in the town is a storage tank, we do not believe this amounts to a place of business. But if the company has an employee who services customers in the town on a fairly regular basis, as opposed to an isolated or occasional transaction, in our opinion the company does have a "place of business" in such town. See **R. V. Smith Supply Co. v. Black**, 43 N.M. 177, 88 P. 2d 269.

It must be remembered, as was pointed out in A.G. Opn. No. 5246 (1949), that the requirement of license fees is not for revenue purposes alone. As we there said, "The purpose of the law is to exercise a close supervision over all places where LP gas is handled". Accordingly, it was concluded that a company which had its principal office in Clovis and which kept one man stationed in Vaughn to supply gas in the Vaughn area from a tank in this town had to obtain an additional license for the Vaughn operation.

We are still of the same opinion. License fees are charged "for the purpose of defraying the expenses of administering the laws relating to the liquefied petroleum gas industry". Section 65-7-8, supra. Yet if a firm could, by the simple expedient of using the same business name, conduct a liquefied petroleum gas operation in every town in the State even though only the main office was licensed, adequate funds for safety inspection purposes would be lacking.

If anything contained in my letter to you of August 31, 1961, is deemed inconsistent with this opinion, the Commission should be guided by this opinion.